

***United States Court of Appeals
for the Second Circuit***



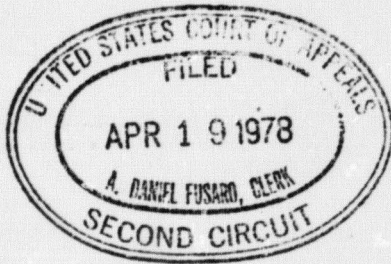
EXHIBITS

77-6166

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARROLL BARNETT, HAROLD MCBRINE,
on behalf of themselves and all
others similarly situated,
Plaintiff-Appellees

v.



JOSEPH A. CALIFANO, JR.,
Secretary of Health, Education,
and Welfare,
Defendant-Appellant

B.P.
S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF VERMONT

EXHIBITS TO BRIEF

Zander B. Rubin, Esq.
Vermont Legal Aid, Inc.
55 Main Street
St. Johnsbury, VT 05819

INDEX

	<u>Page</u>
<u>Wright v. Califano, No. 75-C-1537</u> (N.D. Ill. 1977)	1
<u>Etier v. Califano, No. C-77-0520-WHO</u> (N.D. Cal. 1978)	8
<u>Mathews v. Blankenship, No. C-75-0185 L(A)</u> (W.D. Ky. 1976).	12

832 9-2-77

New Matters

2499-205

burden, but only after the claimant satisfied his initial burden of making out a prima facie case of disability to perform his customary occupation. Teague has failed to satisfy that initial burden here.

The dismissal of the complained [sic] is affirmed.

—Footnote—

* Teague's insured status for disability benefits under the Act expired on December 31, 1973, and thus his application was interpreted as a request for benefits up until that date. Administrative Record at 14, 16.

[¶ 15,272] Roland Wright and Anna Wright, on behalf of themselves and all other persons similarly situated v. Califano. U. S. District Court, N. Dist. of Illinois, E. Div. No. 75 C 1537, 8/2/77.

Hearing and review—Unreasonable delay in administrative process; decisions to be issued within 90 days of filing of petition for hearing or request for review—Secretary's duty to enforce standard of promptness.—Claimants sought equitable relief with respect to the extensive delays in administrative proceedings experienced in Region V by claimants of social security benefits. While the delay in scheduling a hearing in Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin, and parts of Kentucky) in 1975 exceeded 90 days in 82% of the cases, the named plaintiffs' hearing was not scheduled until 17 months after the request for a hearing was filed, and similar delays occurred at other stages of the administrative process. The court found the lengthy and persistent delays in the appeals system violative of the statutory purposes and provisions of the Social Security Act, including §§ 205(a) and (b), and particularly § 1102, which provides that "(t)he Secretary . . . shall make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which [he] is charged. . . ." Moreover, the court found Reg. § 404.908a(b)(2), under which a claimant is excluded from expedited payment if his claim is pending disposition through reconsideration, hearing, Appeals Council or judicial review, to be invalid as violative of § 205(a) of the Act, insofar as it excludes claimants from expedited benefit payments. Having concluded that the Secretary violated his duty to establish regulations and procedures to enforce a standard of promptness, the Secretary is ordered to reduce the maximum time within Region V, between the filing of a petition for a hearing or a request for review and the issuance of a decision to 180 days by January 1, 1978. Thereafter the maximum time is to be further reduced to 120 days by July 1, 1978, and to 90 days by January 1, 1979. Back references: ¶ 12,663, 12,663.09, 12,669.

Hearing and review—Unreasonable delay in administrative proceedings as violation of APA.—Sec. 706 of the Administrative Procedure Act provides that a reviewing court "shall . . . compel agency action unlawfully withheld or unreasonably delayed" In light of the court's finding that current delays in administrative proceedings involving applications for social security benefits are both unreasonable and violative of the purposes and provisions of the Social Security Act, it is held that § 706 of the APA is likewise violated by the Administration's unlawful withholding of agency action. In addition, such unreasonable delays are held to violate § 555(b) of the APA, which provides that prompt notice of denial be given an interested party in connection with any agency proceeding. Back references: ¶ 12,663, 12,669.

Hearing and review—Secretary's duty to enforce standard of promptness.—Sec. 1102 of the Social Security Act imposes upon the Secretary the duty to "make and publish such rules and regulations . . . as may be necessary to the efficient administration of [his] functions," which the court has interpreted as requiring a standard of promptness in administrative proceedings. In view of the unlawful and unreasonable delays experienced by claimants in the administrative disposition of their claims, the court concludes that the Secretary has violated his duty to establish regulations and procedures to enforce a standard of promptness for dealing with social security benefits applications. Back references: ¶ 12,663, 12,669.

James D. Weill, Legal Assistance Foundation, 343 S. Dearborn, Chicago, Ill. 60604, for plaintiffs. Mary Thomas, Asst. U. S. Atty., 219 S. Dearborn, Chicago, Ill. 60604, for defendant.

2499-206

New Matters

832 9-2-77

Memorandum Opinion and Order

KIRKLAND, District Judge: This matter is before the Court on plaintiff's Motion for Summary Judgment pursuant to Rule 56(c), Federal Rules of Civil Procedure.

In this class action plaintiffs seek declaratory and injunctive relief and a writ of mandamus to compel more prompt adjudication of claims involving old age and survivors insurance benefits at the various administrative appeals levels.

Plaintiffs allege that defendants have delayed processing requests for hearings and appeals by persons denied benefits under Old Age, Survivors, and Disability Insurance, Title II of the Social Security Act, 42 U. S. C. §§ 402 *et seq.* ("OASDI"). Plaintiffs argue that these alleged delays are in violation of the Social Security Act, the Fifth Amendment to the United States Constitution and the Administrative Procedure Act, 5 U. S. C. §§ 555 and 706. Jurisdiction is invoked under the Administrative Procedure Act, 5 U. S. C. §§ 701 *et seq.*, 28 U. S. C. §§ 1331 and 1361, and 42 U. S. C. § 405(g). The plaintiff class has previously been certified.

Statement of Facts

Under the basic federal scheme, to obtain social security benefits a wage earner and his family must make application to the Social Security Administration (the "Administration"). OASDI provides an internal administrative process whereby applicants for benefits may appeal adverse decisions within the agency and ultimately to federal court, 42 U. S. C. § 405, 20 C. F. R. §§ 409.907 *et seq.*

Named plaintiff Roland Wright is presently receiving old age benefits on his own social security account. If, however, he were to receive husband's benefits on the account of his wife, his benefits would be higher. (Note: The disparity of benefits is the subject of a separate lawsuit before this Court.) Therefore, on September 1, 1972 Roland Wright applied for husband's benefits. His initial application was denied on November 6, 1972. He requested reconsideration on May 2, 1973, and the denial was affirmed on August 15, 1973. Despite several requests for a hearing on the adverse decision, to the date of the filing of this action, May 13, 1975, no hearing was scheduled.

Roland Wright's experience of numerous delays is not unique. Although this class action consists of claimants in Region V

(Illinois, Indiana, [Kentucky,] Michigan, Minnesota, Ohio and Wisconsin), the discussion below will not necessarily rely on statistics for that region. The information provided by the Administration in response to plaintiffs' interrogatories does not always provide a statistical breakdown by state or region.

Reconsideration is the first step in the administrative process for contesting an adverse ruling. In stipulations entered into by the parties, defendant has indicated that the cumulative data on reconsideration processing time for disability insurance claims would be substantially similar to the reconsideration processing time for old age and survivor claims. The median processing time between initial decision and reconsideration during the period from November, 1973 to May, 1975 was approximately three months. In the case of Roland Wright, the reconsideration took 103 days.

After an adverse ruling, a claimant may request a hearing. The delays in scheduling the hearing after a request is filed are lengthy. In Region V in 1975 82% of the hearings were not scheduled within 90 days, the time-limit set by the Department of Health, Education, and Welfare ("HEW") in other HEW programs. In Roland Wright's case, a hearing was not scheduled until 17 months after his request was filed.

Once the hearing is held, the claimant must then await decision. The Administrative Law Judge takes more than 90 days to issue a decision in 98% of the cases, and more than six months in 71% of the cases. The mean time between a request for a hearing and decision fell somewhere between one and two years in Region V in 1975.

Those individuals dissatisfied with the Administrative Law Judge's decision can then request Appeals Council review. During the period between 1970 and 1975, 40% of the claimants requesting such review had to wait over 90 days for an Appeals Council decision.

In sum, plaintiffs argue that they as claimants have been subject to numerous "illegal" delays. In addition, plaintiffs point out that there is a significant reversal rate of appealed denials of benefits: in 1975 over one-half of the initial decisions denying benefits were ultimately reversed nationally.

After careful consideration of the parties' arguments and pertinent case law, this Court grants summary judgment to plaintiffs and holds that the current delays in processing requests at hearing or Appeals Council

stages violate the Social Security Act and the Administrative Procedure Act. In light of this decision, it is unnecessary to reach the constitutional arguments raised by plaintiffs. Each Act will be considered *seriatim*.

I. Violation of Title II of the Social Security Act

The Social Security Act was passed to provide a system for dealing with income losses. Title II's insurance system is to offer "a basic security to retired persons and to survivors . . .," 1950 U. S. Code Cong. Serv. 3288. Congress has always recognized the fact that vast numbers of people rely on these benefits for most, if not all, of their support, 1967 U. S. Code Cong. & Adm. News 2873, and need the benefits to alleviate economic hardship.

Plaintiffs argue that although the Social Security Act has no specific processing time limits, the Act is replete with provisions that mandate the Secretary of HEW to make efficient determinations.

Defendant Secretary of HEW responds that the fact that Congress has not set specific time limits reflects a legislative intent that accuracy of payment must not be subordinated to speed of payment. Additionally, defendant contends that, although aware of the current processing problem, Congress has not mandated payment if a hearing is not held within 90 days. Defendant reasons that if Congress with its vast knowledge of and power over federal government operations could or would not accord plaintiffs' class the relief they seek (prompt hearings), it necessarily follows that defendant who has far less power at his disposal, has not acted unreasonably in going no further than the steps already taken.

Defendant argues that the delays in appellate adjudications do not arise from omission or commission of acts by defendant. Rather, the delays are alleged to be the result of a massive backlog of cases which has been caused by: (1) a very large one-time volume of claims for Black Lung benefits and the introduction of [the] Supplemental Security Income program at a time when other titles of the SSA were experiencing rapid growth, (2) a lack of flexibility in the use of three distinct corps of hearing officers, and (3) difficulty in appointing additional Administrative Law Judges.

Defendant also argues that a concerted effort has been made to reduce the hearing backlog, e.g., additional support personnel authorized, institution of Staff Attorney

Support Program, transfer of over 7,800 cases from this Region to Administrative Law Judges in other regions.

In sum, defendant contends this Court should defer to administrative and legislative handling of the current processing problem because: (1) both the agency and Congress have been and are continuing to give their attention to the problem; (2) the initiatives the agency and Congress have undertaken represent the "maximum reach of current agency and congressional resources"; (3) further initiatives, if desirable and/or possible, must come from the agency and Congress; and (4) the delays are reasonable given the scope of the problem.

This Court does not agree and holds that unreasonable delays violate the Social Security Act. Prompt payment of old age and survivors benefits is necessary to fulfill the purposes of Title II of the Social Security Act. The problems defendant faces are difficult ones. However, these problems do not absolve defendant of violation of the mandate of the Social Security Act for prompt and efficient determinations of appeals from adverse decisions.

The fact that more than 50% of the adverse decisions are reversed at several administrative stages makes it even more imperative that there be an efficient and responsive appeal procedure. The legislative history of the 1967 amendments to the Social Security Act clearly indicates that "assurance of prompt payment" is essential, both in terms of the well-being of the beneficiaries and the nature of the program, 1967 U. S. Code Cong. & Adm. News 2941.

When the Government does not reach a decision with a minimum of delay, those who are entitled to benefits are forced to bear the burden. This Court finds that the lengthy and persistent delays experienced in the OASDI appeals system in Region V violate the statutory purposes and provisions of the Social Security Act. These provisions include 42 U. S. C. §§ 405 (a), (b), and particularly 42 U. S. C. § 1302 which provides:

The Secretary of . . . Health, Education, and Welfare . . . shall make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which [he] is charged, . . . (emphasis added)

This Court finds that Regulation 20 C. F. R. § 404.968a(b)(2) violates 42 U. S. C. § 405(q) which provides that defendant shall establish and put into effect procedures

under which expedited payment of benefits will be made.

Section 405(q) deals with expedited benefit payments to claimants who did not receive them when due. Payment of benefits is to be made within 90 days after the date on which such benefit was allegedly due, or after which the claimant furnished the last information requested by the Secretary.

Under 20 C. F. R. § 404.968a(b)(2), however, a claimant is excluded from such expedited payment if his claim is pending disposition through reconsideration, a hearing, Appeals Council review or judicial review.

When Sections 405(a) and (b), 1302 and 405(q) are viewed together, congressional concern with promptness of decisions becomes quite evident. The fact that Congress did not set out a specific time limit for appeals decisions does not mean that Congress was not concerned with reasonable promptness in disposition of these appeals.

Although the Supreme Court in *Fusari v. Steinberg*, 419 U. S. 379 (1974), was dealing with termination of unemployment benefits, much of the reasoning in that case is applicable. Specifically, the Court noted:

[T]he possible length of wrongful deprivation of . . . benefits is an important factor in assessing the impact of official action on . . . private interests. Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process. (*Id.* at 389.)

Defendant's argument that the Secretary of HEW should not be forced to make doubtful payments because of the mere passage of time fails to recognize two important facts: (1) most beneficiaries are dependent on their Social Security payments to meet their basic needs; and (2) defendant has failed to establish time limits or even indicate goals or timetables for reducing delay in the administrative process. Additionally, this Court notes that the majority of the recipients who appeal adverse decisions eventually have those decisions reversed.

Accordingly, this Court finds: (1) that the current delays in processing requests by plaintiff class rejected recipients at hearing or Appeals Council stages violate the Social Security Act; and (2) that 20 C. F. R. § 404.968a(b)(2) is invalid as violative of 42 U. S. C. § 405(q) of the Social Security

Act insofar as it excludes plaintiffs and members of the class.

II. Violation of the Administrative Procedure Act

The Administrative Procedure Act ("A. P. A.") provides that a reviewing court "shall . . . compel agency action unlawfully withheld or unreasonably delayed" 5 U. S. C. § 706. In light of this Court's holdings that the current delays in processing requests by plaintiff class rejected recipients at hearing or Appeals Council stages violate the Social Security Act, and that 20 C. F. R. § 404.968a(b)(2) invalidly excludes expedited payments from plaintiff class members, this Court also holds that Section 706 of the A. P. A. is violated by the Administration's unlawful withholding of agency action.

Even if the agency action (or inaction) had not been held unlawful, this Court would still be compelled to find that defendants have violated Section 706 through unreasonable delays. See discussion of delays *infra*.

Defendant argues that considering the reasons for the large backlog, agency attempts to overcome the backlog, and congressional response, the delays in question are not unreasonable.

Although remedial action has been taken by defendant, defendant's reliance on *Federal Trade Commission v. J. W. Hampton, Inc.*, 336 F. 2d 687, 691-92 (5th Cir. 1964), is misplaced. First, *Hampton* involved a complaint before the F. T. C. a matter of a less crucial nature than an appeal of denial of Social Security payments, cf. *Hambridge v. Williams*, 397 U. S. 471 (1970). Also the Fifth Circuit noted the absence of any complaint by plaintiff about the pace of the proceedings, again distinguishable from the situation here.

Although defendant is not refusing to set in process the proper proceedings, the delays involved in the processing appeals of adverse decisions have had the same effect.

Section 555(b) of the A. P. A. also stresses the necessity of agency conclusion of matters within a reasonable time. Particularly in the area of social welfare, agency inaction can be as harmful to the potential recipients as wrong action. Cf. *American Broadcasting Corp. v. F. C. C.*, 191 F. 2d 494 (D. C. Cir. 1951).

Section 555(e) provides that prompt notice of denial be given an interested party in connection with any agency proceeding.

832 9-2-77

New Matters

2499-209

When a rejected recipient must wait between one and two years for a decision after a hearing, prompt notice has not been accorded that individual. Defendant has clearly violated his duty to promptly process these appeals.

In sum, defendant's arguments of case-load and personnel difficulties are insufficient to establish that the delays in processing reconsideration of adverse rulings are reasonable.

Accordingly, this Court finds that defendants have violated Sections 706 and 555(b) and (c) of the A. P. A. through unreasonable delays.

III. Defendant's Promulgation of Regulations

Plaintiffs further contend that defendant Secretary of HEW has violated his duty to establish regulations and procedures to enforce a standard of promptness. This Court agrees.

As noted above, under 42 U. S. C. § 1302, defendant has a duty to "make and publish such rules and regulations . . . as may be necessary to the efficient administration of [his] functions. . . ." In *Mandley v. Trainor*, No. 76-1865 (7th Cir. November 23, 1976), the Seventh Circuit noted that this is a mandatory duty.

Accordingly, this Court finds that defendant has violated his duty to establish regulations and procedures to enforce a standard of promptness for dealing with Social Security appeals.

As noted above, this Court's holding that the delays violate both the Social Security Act and the A. P. A., it is unnecessary to reach the constitutional arguments raised by plaintiffs.

Conclusion

This Court finds:

(1) that the current delays in processing requests by plaintiff class rejected recipients at hearings or Appeals Council stages violate the statutory purposes and provisions of the Social Security Act, including 42 U. S. C. §§ 405(a), (b), (q) and particularly § 1302;

(2) that 20 C. F. R. § 404.968a(b)(2) is invalid as violative of 42 U. S. C. § 405 (q) of the Social Security Act insofar as it excludes plaintiffs and members of the class from expedited benefit payments;

(3) that defendants have violated 5 U. S. C. §§ 7706 and 555(b) and (c) of the A. P. A. through illegal and unreasonable delays in the processing of

appeals at hearing and Appeals Council stages; and

(4) that defendant Secretary of HEW has violated his duty to establish regulations and procedures to enforce a standard of promptness.

Plaintiffs' Motion for Summary Judgment is granted insofar as these findings are concerned and denied otherwise.

Accordingly, within Region V defendants shall reduce the maximum delay between the filing of a petition for a hearing before an Administrative Law Judge and the issuance of a final decision by the Appeals Council to one hundred eighty days by January 1, 1978; and further, defendant shall reduce the maximum delay for final decisions to one hundred twenty days by July 1, 1978; and further, defendant shall reduce the maximum delay for final decision to ninety days by January 1, 1979.

If any of the applicable time limits are not met, defendants shall begin to pay benefits to applicants who have appeals pending for longer than these time limits. Benefits will be paid from the date the time limit runs, as though favorable action had been taken on the claim, until rendition of an unfavorable decision at the final applicable administrative stage. The maximum time period in the processing of these appeals shall exclude periods of delay caused directly by a petitioner.

The parties will submit within twenty-one days a proposed order which reflects this decision.

Additionally, defendant will submit within sixty days of this date proposed regulations which reflect this decision.

Order

This matter coming on to be heard pursuant to this Court's Memorandum Opinion and Order of June 6, 1977, granting plaintiffs' motion for summary judgment, and

The Court having determined, that the provisions of this decree are necessary to insure that defendants as required by the Social Security Act, 42 U. S. C. §§ 405(a), (b), and (q) and 1302, and the Administrative Procedure Act, 5 U. S. C. §§ 706 and 555(b) and (c), process requests for hearings and Appeals Council review of Title II claims of plaintiffs and members of the plaintiff class with reasonable promptness; and provide plaintiffs and members of the plaintiff class with expedited benefit payments pursuant to 42 U. S. C. § 405(q); and to the end that plaintiffs and the

2499-210

New Matters

832 9-2-77

class of persons represented by them have the full relief to which they are entitled.

It is hereby ordered and decreed:

1. This Court has jurisdiction of the subject matter of this action and of each of the parties of this action.

2. For purposes of this Decree:

A. A request for a hearing or a request for review by the Appeals Council is defined as pending for the number of days that has lapsed between the date of request and the date of disposition.

B. The date of request is the date a filled-out and signed request for a hearing or review by the Appeals Council is received by the Social Security Administration.

C. The date of disposition is the date that the decision is issued by the Administrative Law Judge or the Appeals Council.

D. The date of implementation is the date that the Social Security Administration certifies to the Department of Treasury for payment of benefits pursuant to the decision.

E. Region V includes the states of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin [and part of Kentucky—CCH].

3. (a) For purposes of paragraphs 1, 2, and 4 through 12 of this Order, the class consists of all persons residing in Region V of the Social Security Administration, whose claims under the Social Security Old Age and Survivors Benefits Program have been or are being delayed at one of the following stages of the administrative process: hearing or Appeals Council review.

(b) For purposes of paragraphs 8 and 9 of this opinion, the class consists of all persons residing in Region V whose claims under the Social Security Old Age and Survivors Benefits Program have been or are being delayed at one of the following stages of the administrative process: reconsideration, hearing or Appeals Council review.

4. This Court finds:

(a) That the delays in processing requests by members of the plaintiff class at hearings or Appeals Council stages have violated and do violate the statutory purposes and provisions of the Social Security Act, including 42 U. S. C. §§ 405(a), (b), (q) and § 1302;

(b) that defendants have violated and are violating 5 U. S. C. §§ 706 and 555(b) and (c) of the APA through unreasonable delays in the processing of appeals at hearing and Appeals Council stages; and

(c) that defendant Secretary of HEW has violated his duty to establish regulations and procedures to enforce a standard of promptness for requests by the plaintiff class.

5. In all Region V cases where a Social Security applicant files a request for a hearing before an Administrative Law Judge or a request for review by the Appeals Council, defendant Joseph A. Califano, as Secretary of the Department of Health, Education and Welfare, and defendant Paul E. Webb, as Regional Commissioner, Social Security Administration, are ordered, and directed to, with regard to requests pending on the applicable date described below:

(a) Commencing by January 1, 1978, issue all hearing decisions within 180 days from the date of request for a hearing;

(b) Commencing by January 1, 1978, issue all Appeals Council decisions within 180 days from the date of request for review;

(c) Commencing by July 1, 1978, issue all hearing decisions within 120 days from the date of request for a hearing;

(d) Commencing by July 1, 1978, issue all Appeals Council decisions within 120 days from the date of request for review;

(e) Commencing by January 1, 1979, issue all hearing decisions within 90 days from the date of request for a hearing;

(f) Commencing by January 1, 1979, issue all Appeals Council decisions within 90 days from the date of request for review.

6. (a) In all cases in which defendants or their agents do not issue a decision within the specified time limits set forth in ¶ 5 above, defendants are ordered and directed to pay benefits to claimants who have requests for a hearing or Appeals Council review pending, from the date the time limit runs, as though favorable action had been taken on the claim. Such benefit payments must be certified for payment within 15 days from the date on which the time limit ends and shall be paid until a final unfavorable decision has been rendered by the applicable administrative body. The applicable time period shall be tolled for any period where delay is directly attributable to the claimant and/or his representative, if any.

(b) Provisions regarding the right, if any, of the Department of Health, Education and Welfare to recoup payments made under paragraph 6(a) shall be set forth in a separate order following the briefing sched-

832 9-2-77

New Matters

2499-211

ule established by this Court's order of June 14, 1977.

7. The Secretary shall promulgate such regulations, claims manual provisions, and/or other materials and instructions as are necessary to effectuate the rights of members of plaintiff class under §§ 5-6.

8. This Court finds that 20 C. F. R. § 404.968a(b)(2) is invalid as violative of 42 U. S. C. § 405(q) of the Social Security Act insofar as it excludes plaintiffs and members of the class from expedited payments.

9. Defendants are enjoined from applying the provisions of 20 C. F. R. § 404.968a(b)(2) insofar as they preclude the application of 42 U. S. C. § 405(q) to claims from Region V pending before the Secretary on reconsideration, hearing, or Appeals Council review, on or after January 1, 1978.

10. Beginning on January 1, 1978, defendants shall submit to the Court and to the plaintiffs' attorney a monthly report (or, at defendants' option, a quarterly report) setting forth:

(a) the number of requests for hearing in Region V by length of time from date of request to date of disposition, and date of implementation;

(b) the number of requests for Appeals Council review in Region V by length of time from date of request to date of disposition, and date of implementation;

(c) the number of presumptive eligibility payments made pursuant to § 6(a) of this order;

(d) the period of time from the end of the applicable time limit to the date of certification of the presumptive eligibility check.

Said report shall be submitted by the end of the month following the month or quarter to which it applies and shall be provided on a monthly or quarterly basis until such time as this Court, on its own motion or on the motion of either party deems it unnecessary.

11. This Decree shall be binding upon Joseph A. Califano, Paul E. Webb, the Department of Health, Education and Welfare, their officers, agents, servants, employees, and their successors, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

12. This Court shall retain continuing jurisdiction over this cause for all purposes.

[§ 15,273] Angela Williams, by and through her next friend and father, Frank Williams v. Mathews. U. S. District Court, E. Dist. of Louisiana, No. 76-382, Sec. C, 4/11/77.

Dependency status of child—Adoption after entitlement of disability insurance beneficiary.—Sec. 202(d)(8) of the Social Security Act bars payment of benefits to a child adopted after the adopting parent becomes entitled to disability benefits unless the child is the natural child or stepchild of the wage earner or was legally adopted and was living with the disabled wage earner and receiving at least one-half of his support from him during the year before the wage earner's entitlement to disability benefits. The wage earner herein was entitled to disability benefits beginning in February 1972; claimant was born in June 1972 and began living with the wage earner approximately 10 days thereafter, but was not adopted by him until 1974. Because she thus failed to satisfy the dependency requirements of the Act, the denial of claimant's application for child's benefits is upheld. Back reference: § 12,335.07.

Dependency status of child—Constitutionality of dependency provisions re after-adopted children.—Claimant challenged the constitutionality of the provisions of § 202(d)(8) of the Social Security Act prescribing different dependency requirements for children adopted by a wage earner before or after his entitlement to benefits. The test for determining the constitutionality of a statutory classification within the Social Security Act is set forth in the U. S. Supreme Court's decision in *Weinberger v. Salfi* (1975). As discussed in *Salfi*, a classification is consistent with the constitutional guarantees of due process and equal protection of the laws if it is rationally based and free from invidious discrimination. The court herein noted that the status of being adopted has not historically been a focus of discrimination, causes no enduring social stigma, and has never limited access to the electoral process. In addition, the court concluded that the different treatment of children adopted before and after the wage earner's entitlement is consistent with the congressional interest in preventing abuse of the Act through adoptions motivated

RECEIVED

FEB 24 1978

MAR 8 1978

ORIGINAL
FILED

CLERK, U. S. DISTRICT COURT
SAN FRANCISCO

MAR 6 1978

CLERK, U. S. DIST. COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

WARREN ETIER, et al.,

Plaintiffs,

NO. C-77-0520-WHO

JUDGMENT

vs.

JOSEPH A. CALIFANO,

Defendant.

IT IS HEREBY ORDERED that judgment be entered as follows:

IT IS HEREBY ADJUDGED that defendant's failure to provide a prompt administrative hearing and decision to residents of the State of California who have applied for Supplemental Security Income benefits under the provisions of 42 U.S.C. Section 1381 et seq., who have been denied such benefits on the ground that they have initially been found to be not disabled within the meaning of 42 U.S.C. Section 1383(c)(1)(B) and who have made a timely request for a hearing in accordance with 42 U.S.C. Section 1383(c)(2) and 20 CFR Section 416.1426-27 conflicts with the provisions of the Social Security Act, 42 U.S.C. Section 1381 et seq., and the Administrative Procedure Act, 5 U.S.C. Section 55(b) et seq.

//

//

//

//

//

//

IT IS FURTHER ORDERED AND ADJUDGED that:

(1) After January 1, 1980, where the matter in disagreement to be resolved after hearing involves a question as to existence of disability within the meaning of 42 U.S.C. Section 1382 (c) (a) (3), defendant is enjoined, ordered and directed to conduct administrative hearings requested pursuant to 42 U.S.C. Section 1383 (c) (1) and 20 CFR Sections 416.1426-27 by residents of the State of California within 90 days of such request, and to issue a written decision thereon within 120 days of such request, said time periods to be calculated in accordance with FRCivP 4.

(2) Before January 1, 1980, Defendant is further enjoined, ordered and directed to conduct the hearings as described in ¶ 1 and to render decisions thereon within the time periods set out in the following schedule:

	<u>From request to hearing</u>	<u>From request to decision</u>
After June 30, 1978	180	210
After December 31, 1978	150	180
After June 30, 1979	120	150

(3) Exception to the maximum time periods set out in ¶ 1 and 2 may be made in those cases in which:

- a. The claimant directly causes the delay by his or her own failure to provide essential information necessary to the conduct of the hearing;
- b. The claimant requests a continuance, provided, however, that the hearing shall be held as soon as possible in conformance with the request for a continuance;

/////

- 1 c. The claimant fails to appear for a
2 scheduled hearing; or
- 3 d. The hearing officer, as a result
4 of evidence adduced at the hearing,
5 or in the course of post-hearing
6 review, in good faith determines
7 that a consultative medical exam-
8 ination or additional medical
9 evidence in the possession of third
10 parties is required; provided, how-
11 ever, that the exception from the
12 maximum time limit shall be limited
13 to the time required to produce the
14 evidence. Such additional material
15 shall be limited to the time required
16 to produce the evidence. Such additional
17 material shall be obtained with all due
18 diligence.

19 (4) On or before June 16, 1978, defendant shall
20 submit to the court and to counsel for plaintiffs a detailed
21 statement or plan for implementing the relief required by
22 § 1 and 2, and the administrative steps taken to effectuate
23 said plan. Counsel shall further submit a report indicating
24 the number of claimants within the plaintiff class awaiting
25 hearings or final decisions as of that date, and the number
26 of days for which such requests have been pending. The
27 report shall indicate the number of persons awaiting hearings
28 by number of days elapsing since their hearing requests were
29 filed, divided into thirty day increments, and the number of
30 persons awaiting hearing decisions by number of days elapsing
31 since the date their hearings were held by 30 day increments,
32 according to the following format:

SSI CLAIMANTS AWAITING HEARINGS

Number of days elapsing
Since Hearing Request
Filed

Number of Claimants

1 - 90

91 - 120

121 - 150

etc.

SSI CLAIMANTS AWAITING HEARING DECISIONS

Number of days elapsing
Since hearing held

Number of Claimants

1 - 30

31 - 60

61 - 90

etc.

(5) This court shall retain continuing jurisdiction over
this cause for all purposes.

SO ORDERED.

DATED; MAR 6 1978

WILLIAM H. ORRICK

WILLIAM H. ORRICK
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY/
AT LOUISVILLE

USA (3)
COPY (COPIES) MAILED TO
OF JUSTICE ON 5-7-77
D/J FILE NO. 181-31-1
DIVISION CIVIL
SECTION GEN. LIT & ALWB

SAMMIE GAIL BLANKENSHIP, et al,

Plaintiffs,

v.

F. DAVID MATHEWS, Secretary of
Health, Education and Welfare,

Defendant,

U.S. ATTORNEY
WESTERN DISTRICT
OF KENTUCKY
JUL 7 9 51 AM '77
CIVIL ACTION

NO. C 75-185 L(A)

J U D G M E N T

The Court, having considered the cross-motions of the parties for summary judgment and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the motion of the defendant for summary judgment be and it is hereby overruled.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant shall, commencing February 1, 1977, schedule all hearings for persons who are members of the plaintiff-Classes A and B, within 90 days after their original claims for benefits under the O.A.S.D.I. and S.S.I. programs have been denied and redetermination has been sought and denied, and the applicant is seeking a hearing before an Administrative Law Judge or an appropriate substitute therefor, +

IT IS FURTHER ORDERED AND ADJUDGED that the defendant furnish to this Court reports on August 10, 1977, November 10, 1977 and February 10, 1978 stating the names of all persons who have made applications for a hearing before the Administrative Law Judge and the dates on which the dates were assigned to him, provided that the

No. C 75-0185 L(A)

- 2 -

apply to the period August 1, 1977 to November 1, 1977, and the report made on February 10, 1978 shall apply to the period November 1, 1977 to February 1, 1978.

IT IS FURTHER ORDERED AND ADJUDGED that this is a final and appealable judgment and there is no just cause for delay.

Dated

5/6/76



Charles M. Allen
United States District Judge

cc: Counsel of Record

CERTIFIED

U. S. District Court
Louisville, Ky.

Date:

5/6/76

By:

MW 211

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SARAHIE GAIL BLANKENSHIP, et al,

Plaintiffs,

v.

F. DAVID MATHEWS, Secretary of
Health, Education and Welfare,

Defendant.

CIVIL ACTION

NO. C 75-0185 L(A)

MEMORANDUM OPINION

This class action was brought by the plaintiffs challenging delays in hearing procedures afforded to applicants for benefits under the O.A.S.D.I. program found in 42 U.S.C. § 401 et. seq. and the S.S.I. found in 42 U.S.C. § 1381 et seq.

Plaintiffs originally requested in their complaint that hearings before an Administrative Law Judge be granted within 30 days after application for such hearing, but it now retreats to the position that 90 days constitutes a reasonable time. Defendant takes the position that any time limits should not be imposed upon it, but it hopes by February, 1977 to schedule such hearings within 90 days after application.

The parties to the action have filed comprehensive briefs and motions for summary judgment accompanied by voluminous affidavits and extensive discovery procedures. There is no genuine issue as to any material fact, and the action appears to be ripe for decision

No. C 75-0185 L(A)

v. Eldridge, No. 74-204 decided February 24, 1976, 44 U.S.L.W. 4224;
Tatum v. Weinberger, Civil No. C 74-351 L(A), (W.D. Ky. decided
January 16, 1975); Barnett v. Weinberger, No. 74-270 (D.C. Vt. 1975).

The plaintiff-class makes two basic contentions; the first is that the admitted failure of the defendant to schedule hearings for members of the plaintiff-class within 90 days of the date of application for hearing is a violation of applicable statutes 42 U.S.C. § 405 (b) and 42 U.S.C. § 1383(c)(1). The first of these statutes provides:

"The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision."

The latter of the two statutes provides insofar as applicable:

"The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse his findings of fact and such decision"
The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court procedure.

No. C 75-0185 L(A)

- 3 -

As will be noted from the language set out above, the statutes provide reasonable notice to the applicant and an opportunity for a hearing. The statutes do not, in and of themselves, specify a time limit for the holding of the hearing, but the plaintiff argues that the statutes must be considered in connection with the Administrative Procedure Act, 5 U.S.C. § 706(1), which authorizes the federal courts to compel agency action unlawfully withheld or unreasonably delayed. 15-4

Only one case has discussed the applicability of the mandamus and administrative procedure statutes to the Social Security statutes cited above. That case is Barnett v. Weinberger, supra, and there the plaintiffs sought declaratory and injunctive relief compelling the Social Security Administration, within a reasonable time, to schedule redetermination hearings on their appeals from adverse administrative reconsideration of the denial of their claims for disability benefits under 42 U.S.C. § 1381 et seq., the same relief which is sought by plaintiff-Class B in this action.

In Barnett v. Weinberger, supra, the defendants moved to dismiss for lack of jurisdiction and the court, in overruling the motion to dismiss, while stating that the Administrative Procedure Act did not confer any additional jurisdiction not expressly authorized by a separate statutory grant of power, held, first, that mandamus might properly be sought, inasmuch as the S.S.I. Regulations clearly established a right to an administrative reconsideration hearing; second, that the Administrative Procedure Act clearly imposed a duty to act within a reasonable time, 5 U.S.C. § 555(b); and third, that the

No. C 75-0185 L(A)

- 4 -

The Barnett court pointed out that while neither the Administrative Procedure Act nor the applicable S.S.I. Regulation specified what constituted a reasonable time within which to schedule a reconsideration hearing, the Administrative Procedure Act clearly holds that an agency must act within a reasonable time, and, therefore, that the Court had the power to compel agency action within a reasonable period. The Barnett court went on to state that even discretionary acts could fall within the reach of mandamus if an officer has gone so far beyond his discretions as to warrant judicial interference. See Nixon v. Secretary of Navy, 422 F.2d 934 (2nd Cir. 1970) and United States ex rel, Schonbrun v. Commanding Officer, 403 F.2d 371, 374 (2nd Cir. 1968), cert. denied, 394 U.S. 929 (1969).

During the year 1975 Congress engaged in extended debate on the question of improving the efficiency of the Department of Health, Education and Welfare with respect to the admittedly large backlog of pending Social Security claims which amounted to 113,000 cases at the time of the debate. New personnel were authorized and other steps were taken by Congress to improve the efficiency of the Department but basically the hearing provisions, 42 U.S.C. § 405(b) and 42 U.S.C. § 1383(c)(1)-(3), were left unchanged.

More specifically, 42 U.S.C. § 1383(c)(2) still provides only that determination on the basis of the hearing provided for in § 1383 (c)(1) shall be made within 90 days after the individual requests the hearing, except where the matter in disagreement involves the existence of a disability within the meaning of § 1382c(a)(3). This statute, as read literally, addresses itself to the speed with which

No. C 75-0185 L(A)

- 5 -

hearing, rather than 90 days after the hearing itself was held, except where the question of disability arises.

While this section fails to set a specific time for a hearing, it clearly shows the Congressional intent that both hearing and decision be completed within 90 days after a request for a hearing, except in disability cases. The fact that Congress did not specify a specific time limit for these two steps to be taken in disability cases is no proof of intent that Congress was not concerned with reasonable promptness in the scheduling of disability cases. In fact the provisions of the statute which provide for a reasonable opportunity to be heard, when taken in conjunction with the speed within which decisions must be made in non-disability cases, is an indication of Congress' concern with promptness.

While no Supreme Court case directly in point exists, significant and enlightening comments are made in Fusari v. Steinberg, 419 U.S. 379 (1975), and the court reasoned that statutory problems arising under the "when due" requirement of 42 U.S.C. § 503(a)(1) and constitutional problems arising under the Due Process Clause of the Fourteenth Amendment are significantly affected by the length of the period of deprivation of benefits. See 419 U.S. at p. 387. as well as 419 U.S. at p. 389, where it is stated that "[p]rompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations." The court stated, therefore, that "the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process" by which Connecticut unemployment compensation laws and claims to benefits were

No. C 75-0185 L(A)

- 6 -

ring opinion, stated that due process consists of the opportunity to be heard at a meaningful time and in a meaningful manner. In the cases of several of the classes represented, there was a delay of at least 8 months, and in at least one case, as much as 1 year, in scheduling the hearing on the claim for reconsideration by the applicant.

Furthermore, it is shown that in Kentucky some 67% of the applicants are awarded benefits after their initial claims have been denied. Again, the mere citation of these facts would warrant a conclusion that due process rights of members of the class would be seriously affected by delays such as those set out above.

In considering the due process arguments of the parties, the Court notes that both plaintiff and defendant have suggested the use of the balancing test set out in Mathews v. Eldridge, supra, at p. 4229. The balancing test consists of three elements: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest, through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

With regards to the first criterion, we note that S.S.I. applicants in order to be eligible, must have an income of below \$146 per month. We do not believe that any intelligent human being can contest the conclusion that persons having such a minimal income are not only poor but in dire need of help. In reaching this conclusion, we have not

No. C 75-0185 L(A)

- 7 -

which would be in excess of the poverty level. Quite possibly it might be incorrect to categorize them as being "in brutal need", but the fact remains that O.A.S.D.I applicants, generally speaking, are persons who have had very little or no income for at least some substantial period of time prior to their filing an application for benefits. This has been made obvious to this Court by its review of the many such cases that come to this Court for decision after exhaustion of remedies with the HEW.

Coming now to the next criterion, that is, the risk of an erroneous deprivation of benefits by reason of a substitute procedure, that risk is not material, since the only relief being sought is a prompt hearing. Plaintiffs do not ask for any other change in the procedures of HEW, and the only risk of erroneous deprivation of rights would arise if defendant should be forced into speedy, incorrect and ill-considered judgments as to the justice of the applicant's claims. We do not believe that such deprivation will occur under the plan which this Court intends to adopt with reference to the hearing dates, since the plan is tailored, both in light of the pending backlog of claims and in light of the defendant's statement, so that it will grant hearing within 90 days by February, 1977.

The governmental interest in the program is that it administer a rational welfare program of finite resources and means in as fair, equitable and efficient manner as possible. The system must be fair and it must work. See Richardson v. Perales, 402 U.S. 389 (1971), at p. 399.

While the defendant is concerned with additional costs in the

No. C 75-0185 L(A)

- 8 -

office, Congress has already seen fit to increase the personnel available to the defendant to process claims, as well as modern equipment, which will help in the prompt disposition of such claims. The defendant is already required by law to provide a reasonable opportunity for a hearing, and we do not believe that he can successfully plead increased costs as a valid defense to the violation of the Congressional right, and to the violation by him of statutory mandamus, even though such violation does not spring from ill will toward the plaintiff class, but simply from a lack of manpower provided with which to resolve the claims of the plaintiff-class.

We believe, therefore, that the plaintiff-classes have satisfied the balancing test set out in Mathews v. Eldridge, supra, and that they are entitled to relief.

The Court recognizes the tremendous burdens that were imposed upon the defendant by the addition of the black lung program and by the recession of 1974-75, and by the steadily increasing number of claims presented to him for consideration. However, in light of these facts, and in light of the defendant's statement made to this Court, that he hopes to be able to schedule all hearings within 90 days after application within one year from date, we hold that he should be compelled to adhere to that statement, and that a judgment should be entered to the effect that the defendant must schedule all applications made by members of the class for a hearing by an Administrative Law Judge within 90 days after application is made, provided that this date will not be imposed upon the defendant until February 1, 1977.

We do not impose the 90 day standard immediately because

No. C 75-0185 L(A)

- 9 -

applicants for benefits who constitute a part of the national backlog. If the defendant was required to immediately comply with the 90 day standard, he would probably have to bring in additional personnel from other areas, thereby prolonging the administrative process for applicants ... those areas or those examiners who were located here in order to meet the 90 day standard which might cutdown on the quality of their decisions.

We have noted that District Judge Garrity in Santos v. Weinberger, Civil No. 75-166 G (D.Mass. 1975) ordered that the Social Security Administrator in Cambridge process the S.S.I. applications of members of the class in such a manner that each member receives either an initial payment or a denial notice on or before the 45 days after the date of his or her application, or 15 days after the date of his order, with certain exceptions set out in order to afford the defendant time to receive documents from the applicant.

No opinion was supplied with a copy of Judge Garrity's order, which was entered after a hearing on a preliminary injunction, but if the order is to be interpreted as requiring payments or notice of denial of payments within 45 days after the initial application for benefits, this Court cannot concur with it. We believe that the 90 day provision, with the extension to February 1, 1977, is sufficient time within which to allow the defendant to get his house in order.

We believe also, in line with our opinion in Phillips v. Dawson, 393 F.Supp. 360 (W.D. Ky. 1975), that the Court should monitor this judgment, and that defendant should be required to furnish to the Court

On August 10, 1977, November 10, 1977 and February 10, 1978

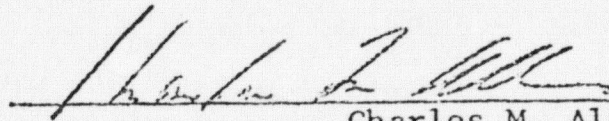
No. C 75-0185 L(A)

- 10 -

May 1, 1977 to August 1, 1977; and the report for February 10, 1978 is to cover the period from November 1, 1977 to February 1, 1978.

A judgment in accordance with this opinion has this day been entered.

Dated 5/6/76



Charles M. Allen
United States District Judge

cc: Counsel of Record

CERTIFIED
U. S. District Court
Louisville, Ky.
Date: 5/6/76
By: M. Webb
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

SAMMIE GAIL BLANKENSHIP, et al,

Plaintiffs,

v.

F. DAVID MATHEWS, SECRETARY OF
HEALTH, EDUCATION AND WELFARE,

Defendant

U.S. ATTORNEY
JUL 2 4 34 PM '76
WESTERN DISTRICT
KENTUCKY
CIVIL ACTION

NO. C 75-0185 L(A)

1 COPY (COPIES) MAILED TO DEPT.
OF JUSTICE ON 7-7-76
D/J FILE NO. 181-31-13
DIVISION CIVIL
SECTION Appellate Attn: H. Silver

AMENDED JUDGMENT

Defendant, having moved to clarify and amend the judgment previously entered herein, and the Court being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that said motion is overruled, except as follows:

The third literary paragraph of the judgment entered on May 6, 1976 is supplemented by providing after the word "therefore" the following words:

"where good cause is shown for a delay of more than 90 days"
In this context, good cause means circumstances beyond the control of the defendant, or circumstances caused by conduct of the members of the plaintiff classes, or such other extraordinary circumstances as the Court may deem to constitute good cause for the delay.

In the event of any delay beyond 90 days, the defendant shall furnish to the Court and to counsel for the class plaintiffs, as

No. C 75-0185 L(A)

- 2 -

15 days after the 90 day period has expired.

IT IS FURTHER ORDERED AND ADJUDGED that the original judgment entered herein is reaffirmed subject to the supplementation of the third literary paragraph set out hereinabove.

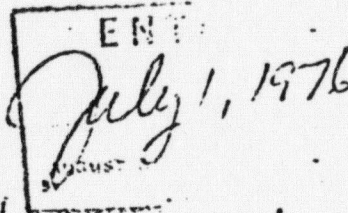
This is a final and appealable judgment and there is no just cause for delay.

July 1, 1976

Charles M. Allen

Charles M. Allen
United States District Judge

cc: Counsel of Record



M. W. Allen